# RE VASUDEVAN SHANMUGAM; EX P ABDUL RAZAK ABDUL MAJID

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[BANKRUPTCY NO: D8-29-3118-2005]
15 MAY 2008

***BANKRUPTCY:*** *Creditor's petition - Application to strike out - Validity of petition - Propriety of judgment obtained by creditor upon which petition based - Whether creditor not entitled to judgment*

***BANKRUPTCY:*** *Notice - Opposition to petition - Service of - Whether there was fatal non-compliance - Bankruptcy Rules 1969, r. 117*

This was an appeal by the judgment debtor against the decision of the senior assistant registrar dismissing the judgment debtor's application to strike out the creditor's petition. The petition was based on a judgment obtained by the judgment creditor at the Sessions Court. That claim by the judgment creditor against the judgment debtor was for the return of monies advanced to the judgment debtor from a partnership account of which both of them were partners. The judgment debtor's application to set aside the creditor's petition was premised on the ground that the judgment creditor, the judgment debtor's partner, had no right to keep the judgment sum ordered by the Sessions Court as the same ought to be paid into the partnership. The judgment creditor, however, contended that the application should not be entertained as the judgment debtor had failed to comply with r. 117 of the Bankruptcy Rules 1969 ('Rules') by not serving the notice to oppose the creditor's petition three days before the first hearing date. This, the judgment creditor averred, was a fatal non-compliance and could not be cured.

**Held (allowing the appeal, and setting aside the creditor's petition; the AO and RO granted pursuant to the petition also set aside):**

**(1)** Rule 117 of the Rules applies only to a situation where the judgment debtor intends to show cause to the statement in the petition, unlike in the instant petition where the judgment debtor was applying to set aside the creditor's petition. *Tengku Zainul Hisham Tengku Hussin v. Arab-Malaysian Finance Bhd* (foll). In this instance, the AO and RO were obtained by the judgment creditor against the judgment debtor by a judgment

of the Sessions Court which was awarded to the partnership rather than to the judgment creditor. A bankruptcy court can go behind the judgment to examine the propriety of the judgment itself in order to ascertain its nature. Having examined the judgment creditor's statement of claim, it was clear that the claim by the judgment creditor at the Sessions Court was made on the basis that the judgment debtor had borrowed the sum claimed from the partnership account (of which both of them were partners). As such, the judgment sum that was obtained against the judgment debtor should be paid into the partnership account. The money belonged to both of them and the judgment creditor was entitled to his share only upon the dissolution of the partnership. That being the case, the judgment creditor should not be in a position to issue a bankruptcy notice and to present the creditor's petition on the assumption that the judgment sum was owed to him alone. A petition based on a judgment that the judgment creditor was not entitled to would constitute a fraud allowing this court to look behind the judgment. (paras 8, 9 & 10)

**Case(s) referred to:**

*Development & Commercial Bank Bhd v. Datuk Ong Kian Seng [1995] 3 CLJ 307 FC* ***(refd)***

*Perwira Affin Bank Bhd v. Lim Ah Hee [2004] 2 CLJ 787 FC* ***(refd)***

*Re Fraser; ex p Central Bank of London [1892] 2 QB 633* ***(refd)***

*Re Margaret Mary Nashataram GP Gomez Ex P Arab Malaysian Finance Bhd [2002] 8 CLJ 924 HC* ***(refd)***

*Re Sebastian; ex p Metroplex Leasing & Credit Corp Sdn Bhd [1990] 3 MLJ 248* ***(refd)***

*Tengku Zainul Hisham Tengku Hussin v. Arab-Malaysian Finance Berhad [2004] 1 LNS 547* ***(foll)***

**Legislation referred to:**

Bankruptcy Rules 1969, rr. 92, 117

Rules of the High Court 1980, O. 77 r. 6

**Other source(s) referred to:**

*Halsbury's Laws of England,* 4th edn, para 357

*For the judgment creditor - Azwan Jamlus; M/s Suhaimi Khor Zulkifli & Chang*

*For the judgment debtor - Leelawathy Rajasingam; M/s R Leela & Assoc*

*Reported by Suresh Nathan*

## JUDGMENT

**Kang Hwee Gee J:**

**This Is My Oral Judgment:** ***(ex-tempore)***

**[1]** This is an appeal by the judgment debtor against the decision of the senior assistant registrar in dismissing the judgment debtor's application to strike out the creditor's petition.

**[2]** The petition is based on the judgment obtained by the judgment creditor at the Sessions Court which read as follows:

DALAM MAHKAMAH SESYEN DI KUALA LUMPUR

DALAM WILAYAH PERSEKUTUAN, MALAYSIA

SAMAN NO. 12-52-12533-2001

ANTARA

ABDUL RAZAK BIN ABDUL MAJID ... PLAINTIF
(t/a V.V. Autocare)

DAN

VASUDEVAN A/L SHANMUGAM ... DEFENDAN

DI HADAPAN PUAN NIK HASMAT BINTI NIK MOHAMAD

PADA 8 HARIBULAN DISEMBER 2003

DALAM MAHKAMAH TERBUKA

PENGHAKIMAN

TINDAKAN INI setelah dikemukakan untuk perbicaraan pada 14hb Ogos 2003 dengan kehadiran Encik Zainur bin Zakaria peguamcara bagi pihak Plaintif dan Encik Satish Nair peguamcara bagi pihak Defendan DAN SETELAH MEMBACA pliding yang difailkan di sini DAN SETELAH MENDENGAR hujahan peguamcara Plaintif dan pegumcara Defendan tersebut dan keterangan saksi-saksi berkenaan DAN SETELAH MEMBACA hujahan-hujahan bertulis peguamcara Plaintif dan peguamcara Defendan dan kes dipanggil untuk keputusan dengan kehadiran Encik Satish Nair peguamcara bagi pihak Defendan yang menyebut bagi pihak peguamcara Plaintif.

MAKA ADALAH DIHAKIMKAN bahawa Defendan hendaklah membayar jumlah sebanyak RM85,136.58 dan faedah 8% setahun bermula dari tarikh penghakiman hingga penyelesaian penuh dan kos untuk tindakan ini sebanyak RM1,546.00.

Bertarikh pada 8 haribulan Disember, 2003.

t.t.
...
Pendaftar
Mahkamah Sesyen
Kuala Lumpur

KOS TINDAKAN

| | | |
|---|---|---|
| 1. Saman dan Pernyataan Tuntutan | RM | 100.00 |
| 2. Afidavit Penyampaian | RM | 4.00 |
| 3. Jawapan kepada Pembelaan | RM | 4.00 |
| 4. Ikatan Pliding dan Dokumen | RM | 8.00 |
| 5. Kos Pendakwaan | RM | 1,250.00 |
| 6. Kehadiran (8 x RM10) | RM | 80.00 |
| 7. Penghakiman bertarikh 8/12/2003 | RM | 100.00 |
| | RM1,546.00 | |
| | ========= | |

**[3]** At the Sessions Court the judgment creditor's claim against the judgment debtor was for the return of monies advanced to the judgment debtor from the partnership account of which both of them were partners.

**[4]** The judgment debtor's ground for making this application to set aside the creditor's petition is premised on the ground that the judgment creditor, the partner of the judgment debtor has no right to keep the judgment sum ordered by the Sessions Court as the same ought to be paid into the partnership.

**[5]** Further the execution of the judgment by way of this bankruptcy proceeding was made without obtaining the leave of the court as required under O. 77 r. 6 of the Rules of the High Court 1980 which read as follows:

**6 Enforcing judgment in action between partners, etc (O. 77 r. 6)**

(1) Execution to enforce a judgment or order given or made in:

(a) an action by or against a firm in the name of the firm, against or by a member of the firm; or

(b) an action by a firm in the name of the firm against a firm in the name of the firm where those firms have one or more members in common,

shall not issue except with the leave of the Court.

(2) The Court hearing an application under this rule may give such directions including directions as to the taking of accounts and the making of inquiries as may be just.

**[6]** Reply by counsel for the judgment creditor: (verbatim)

1. The application should not be entertained in this case as the judgment debtor has failed to comply with r. 117 of the Bankruptcy Rules 1969 which read as follows:

> Where a debtor intends to show cause against a petition he shall file a notice with the Registrar specifying the statements in the petition which he intends to deny or dispute and transmit by post or otherwise to the petitioning creditor and his solicitor if known a copy of the notice three days before the day on which the petition is to be heard.

In this case the judgment debtor failed to comply with r. 117 as the notice to oppose the creditor's petition was not served three clear days before the first hearing date fixed on 7 March 2007. The said notice was only served on 27 July 2007 well passed the first date fixed for hearing. This is a fatal non-compliance and cannot be cured as been held in *Development & Commercial Bank Bhd v. Datuk Ong Kian Seng* [1995] 2 MLJ 724 per Mohamed Dzaiddin FCJ at Held (1) and (2):

> (1) Rule 117 provides that where a debtor intends to show cause against a petition, he shall file a notice in Form 16 of the Rules specifying the statements in the petition which he intends to deny or dispute. Rule 18 further provides that except where the Rules or the Act provide, every application shall, unless the court otherwise directs, be made by motion supported by an affidavit. Failure to

follow r. 18 renders an affidavit in opposition ineffective and bad in law. Accordingly, the debtor's affidavit in opposition could not be substituted as a notice to show cause against the petition to challenge the validity of the bankruptcy notice.

(2) The debtor's failure to file a notice under r. 117 supported by an affidavit could not be excused as a mere formal defect. Rule 117 clearly provides that if a debtor intends to show cause against the petition, he shall file a notice in Form 16. No breach of a mandatory rule can be described as a formal defect or an irregularity that can be cured. Section 131 of the Act and r. 274 of the Rules do not apply.

2. The same issue was canvassed in the application by the judgment debtor to set aside the bankruptcy notice and the same had been dismissed by the senior assistant registrar on 27 April 2006.

3. The judgment on which the bankruptcy notice was issued was enclosed together with the judgment creditor's application to issue the bankruptcy notice and there is also no proof that the plaintiff in the said judgment in the Sessions Court and the judgment creditor in the bankruptcy proceeding are two different parties. See *Re Margaret Mary Nashataram GP Gomez Ex P Arab Malaysian Finance Bhd* [2002] 8 CLJ 924 at Held (1) and (2):

[1] Rule 92 of the Rules serves the purpose of providing the registrar with the means to verify the existence of a judgment and to satisfy him that it was in order to issue the bankruptcy notice. He is bound to issue the bankruptcy notice if he is satisfied that the JC had obtained a judgment sum of the statutory minimum sufficient to issue a bankruptcy notice. (p 942 e-f)

[2] Once the registrar issues a bankruptcy notice the JD may only apply to set aside the notice by showing that no such judgment order has been made against him. The JD is not entitled to have the judgment notice set aside merely by pointing to some procedural defects in the application or in the issuance of the notice. (p 942 h-i)

The bankruptcy notice would only be issued after the registrar is satisfied that the judgment creditor had fulfilled the requirement in r. 92 where in this case the judgment creditor did comply with r. 92. Therefore the argument that the judgment creditor was not entitled to enforce the judgment obtained by the issuance of the bankruptcy notice is unsustainable.

4. Order 77 r. 6 which requires leave to be obtained from the court in cases where a party intends to execute against his partner does not apply. It only applies in situation where an action by a firm in the name of the firm against one of the partners in that firm or in an action against a firm in the name of the firm by one of the partners in that firm. Order 77 r. 6 is not applicable in this case as the action in the judgment obtained is an action by an individual Abdul Razak bin Abdul Majid ie, the judgment creditor in this bankruptcy proceeding against another individual Vasudevan a/l Shanmugam ie, the judgment debtor. Furthermore a bankruptcy proceeding is not a writ of execution of judgment. See *Perwira Affin Bank Bhd v. Lim Ah Hee* [2004] 2 CLJ 787.

**[7]** Reply by counsel for the judgment debtor: (verbatim)

1. Rule 117 is inapplicable here because the rule only provides for any debtor intending to show cause and it applies where the debtor intends to deny or dispute any statement in the petition. It does not apply to cases where the judgment debtor intends to set aside the creditor's petition before it is heard. This is an appeal against the dismissal of the judgment debtor's application to set aside the creditor's petition on the grounds stated. See *Tengku Zainul Hisham b Tengku Hussin v. Arab-Malaysian Finance Berhad* [2004] 1 LNS 547:

> (1) Rule 117 of the Rules, which carried a headnote: "Debtor intending to show cause", is only applicable in situations where the Judgment Debtor only intends to show cause against the creditor's petition. In the case of *Dato' Sri Teong Teck Lee v. Jupiter Securities Sdn. Bhd.* [2004] MLJ 1 is was held that:
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> > In our view, where the Judgment Debtor only wishes to show cause against the petition, all he has to do is to file a notice in form 117 specifying the statements in the petition which he intends to deny or dispute. That is all he has to do.

(2) Other than to show cause, if the Judgment Debtor intends to set aside the creditor's petition that it is incumbent for the Judgment Debtor to file an application by way Summons in Chambers.

(3) On the authority of *Dato' Sri Teong Teck Lee v. Jupiter Securities Sdn. Bhd.* [2004] MLJ 1 it was held that:

> ... As we have said earlier, the inclusion of the words 'creditor's petition or' in the sentence is rather unfortunate. But, we think even that can be explained if we draw a distinction between 'to show cause against a petition' and 'to challenge a petition'. In the case of the former, the method is provided by r. 117 (form no. 16). But where the debtor wants to apply to set aside the petition on other grounds, e.g. for non-compliance with the rules regarding the petition, then a Summons in Chamber must be filed. This is understandable because such grounds arise separately from the statements in the petition and therefore cannot be 'specified' in the statements in the notice (Form No 16).

## Findings And Decision

**[8]** I respectfully agree with Mohamed Apandi Ali, JC (as he then was) in *Tengku Zainul Hisham, supra* that r. 117 of the Bankruptcy Rules 1969 applies only to a situation where the judgment debtor intends to show cause to the statement in the petition unlike in the instant petition where the judgment debtor is applying to set aside the creditor's petition.

**[9]** I agree entirely with the submission of counsel for the judgment debtor that the AO and RO were obtained by the judgment creditor against the judgment debtor by a judgment of the Sessions Court which was awarded to the partnership rather than to the judgment creditor. A bankruptcy court can go behind the judgment to examine the propriety of the judgment itself in order to ascertain its nature. See *Re Sebastian, ex p Metroplex Leasing & Credit Corp Sdn Bhd* [1990] 3 MLJ 248 at 250 per VC George J (as he then was) who appeared to have adopted the English Court of Appeal case in *Re Fraser, ex p Central Bank of London* [1892] 2 QB 633 as summarised in *Halsbury's Laws of England* (4th edn) at para 357:

A Court not necessarily bound by judgment. Where the act of bankruptcy relied on is non-compliance with a bankruptcy notice, the judgment or order is conclusive in the bankruptcy court, unless the consideration for it can be questioned. However, for the purpose of determining whether a receiving order should or
B should not be made, the court may go behind the judgment or order and inquire into the consideration, and on finding that there was no valid or legal consideration, may refuse to make a receiving order. This may be done at the request of the debtor, even where the judgment or order was by consent. Even where the appellate court has refused to set aside the judgment or order,
C the bankruptcy court may still go behind it and inquire into the liability on which it is founded but on the hearing of a petition the bankruptcy court has no power to go behind a judgment obtained in open court against a debtor represented there, no fraud being suggested.

D The court should only go behind a judgment obtained by default or compromise, or whether fraud or collusion is alleged.

**[10]** Having examined the judgment creditor's statement of claim, it is clear that the claim by the judgment creditor at the Sessions
E Court was made on the basis that the judgment debtor had borrowed the sum claimed from the partnership account (of which both of them were partners) and as such the judgment sum that was obtained against the judgment debtor should be paid into the partnership account. The money belonged to both of them and
F the judgment creditor is entitled to his share only upon the dissolution of the partnership. That being the case the judgment creditor should not be in a position to issue a bankruptcy notice and to present the creditor's petition on the assumption that the judgment sum was owed to him alone. A petition based on a
G judgment which the judgment creditor was not entitled to constitute a fraud which allows this court to look behind the judgment.

**[11]** The creditor's petition ought to be set aside with costs.

H **[12]** As AO and RO had been granted pursuant to the petition on 28 March 2008 the same should accordingly be also set aside.

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